IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-439

Filed: 7 November 2017

Guilford County, No. 16 CVS 7153

SERENITY COUNSELING AND RESOURCE CENTER, INC., Plaintiff,

v.

CARDINAL INNOVATIONS HEALTHCARE SOLUTIONS, Defendant.

Appeal by Plaintiff from an order entered 15 November 2016 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 19 September 2017.

Gray Newell Thomas, LLP, by Angela Newell Gray, for Plaintiff-Appellant.

Womble Carlyle Sandridge & Rice, LLP, by Christopher W. Jones, for Defendant-Appellee.

INMAN, Judge.

Serenity Counseling and Resource Center, Inc. ("Plaintiff") appeals from an order granting a motion by Cardinal Innovations Healthcare Solutions ("Defendant") to dismiss Plaintiff's claims for breach of contract and unfair and deceptive trade practices. Plaintiff argues that Defendant breached their contract by providing an

impermissible, pretextual reason for removing a behavioral health service provided by Plaintiff from the contract.

After careful review, we affirm.

Factual and Procedural History

This dispute arises out of a procurement contract for healthcare services (the "Contract") to be provided by Plaintiff for Defendant's enrolled members. **[R p 31]** The following facts are alleged in Plaintiff's complaint or stated in the Contract and are accepted as true for the purposes of our review. [1]

Plaintiff is a North Carolina corporation providing various behavioral health services, including intensive in-home services ("IIHS"), to children, adolescents, and adults. Plaintiff's president, chief executive officer, and owner and operator was, at all relevant times, Dr. Kimberly Cuthrell ("Dr. Cuthrell"). Dr. Cuthrell is neither a psychologist nor a psychiatrist. Defendant is a non-profit organization that serves uninsured individuals or those eligible for Medicaid. Defendant offers specialty health plans and enrolls healthcare providers in its network to provide services to its members.

[1] While Plaintiff does not dispute this issue, we note that the trial court's consideration of the Contract, which was not attached to the pleadings, was proper and did not convert Defendant's motion to dismiss into one for summary judgment. "[A] trial court's consideration of a contract which is the subject matter of the action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) (citation omitted). Here, the Contract is the subject of Plaintiff's complaint and is specifically referenced therein. Therefore, the trial court's consideration of the Contract did not convert Defendant's Rule 12(b)(6) motion into one of summary judgment.

The parties entered into the Contract in November 2011. The relevant portions of the Contract and associated agreements are summarized as follows: Plaintiff, defined as an independent contractor, agreed to provide certain behavioral health services to clients referred to Plaintiff by Defendant.

Defendant's referrals of clients and authorization of payments to Plaintiff are not guaranteed under the Contract; rather, Defendant "reserves the right, in its sole discretion, to provide no Client referrals or authorizations for treatment to [Plaintiff] . . . ." In addition to the right to provide no referrals, Defendant "reserves the right, in its sole discretion, at any time during the term of the Contract to remove one or more services provided by [Plaintiff] . . . for no reason or any reason . . . ." In the event Defendant seeks to remove a service, Defendant is required to "provide [Plaintiff] with thirty (30) days written notice prior to the removal . . . ."

The terms of the Contract were set to renew annually provided that Plaintiff continued to meet the requirements and qualifications under the Contract, but also permitted Defendant to terminate the Contract "without cause, for any reason, at any time, upon mutual consent of [the parties], or without cause, for any reason, at any time, after sixty (60) days upon written notice of termination by one party to the other."

In February 2015, a separate service provider, WesCare Professional Services, Inc. ("WesCare") filed a contested case petition against Defendant in the Office of

Administrative Hearings (the "WesCare Matter"). The petition alleged that Defendant failed to reimburse WesCare for services it provided to clients referred to WesCare by Defendant in violation of a contract between WesCare and Defendant. In June 2015, Dr. Cuthrell submitted an affidavit in the WesCare Matter that was contrary to Defendant's interest.

Shortly after Dr. Cuthrell submitted her affidavit in the WesCare Matter, Defendant reduced the number of clients referred to Plaintiff for IIHS, and Defendant performed an audit of Plaintiff's records regarding IIHS, as allowed under the Contract. In November 2015, Defendant sent a letter notifying Plaintiff of a low score on the audited records. In February 2016, Defendant notified Plaintiff that it intended to remove IIHS from the Contract. Defendant subsequently removed IIHS as a service provided by Plaintiff.

Plaintiff filed suit on 30 August 2016, alleging that Defendant's removal of IIHS from the Contract breached the Contract and violated the North Carolina Unfair and Deceptive Trade Practices Act. Defendant moved to dismiss the suit pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court granted Defendant's motion on 15 November 2016, and Plaintiff timely appealed.

Analysis

Plaintiff argues that the trial court erred in dismissing its claims because: (1) while Defendant was permitted per the terms of the Contract to terminate the relationship for "any" or "no" reason, the reason provided by Defendant was impermissible and pretextual—*i.e.*, not the reasons stated by Defendant but rather in retaliation for Dr. Cuthrell's affidavit in the WesCare Matter—and therefore Plaintiff should have been allowed to proceed under a theory of breach of contract; and (2) Defendant's retaliatory termination of the Contract constitutes an unfair and deceptive trade practice. We disagree.

1. Standard of Review

"The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (citation omitted). "Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). On appeal, this Court "conduct[s] a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial

court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (alteration in original) (internal quotation marks and citations omitted).

2. Breach of Contract

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). The parties do not dispute that a valid contract exists between Plaintiff and Defendant.[2] Plaintiff asserts that Defendant removed IIHS from the Contract in retaliation for Dr. Cuthrell's testimony against Defendant in a separate dispute, contrary to the reason provided by Defendant, thereby giving rise to a genuine issue of material fact as to the actual reason and whether that reason was permissible under the Contract.[3]

In light of the terms of the Contract and taking the allegations in the complaint as true, Plaintiff's argument is without merit. No authority cited by Plaintiff or found

[2] Plaintiff argues in the alternative that the Contract is unconscionable. Because this argument was not raised before the trial court, it is not preserved for appeal. *See* N.C. R. App. P. 10(a)(1) (2015). Assuming *arguendo* the issue was preserved, we note that "unconscionability is an affirmative defense," and has not been recognized by our appellate courts as an independent basis to support a claim for breach of contract. *See Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 102, 655 S.E.2d 362, 369 (2008).

[3] Plaintiff cites the standard for a motion for summary judgment, N.C. R. Civ. P. 56, which is the incorrect standard when considering a Rule 12(b)(6) motion, N.C. R. Civ. P. 12(b)(6). As discussed *infra*, this error is immaterial to our ruling because even taking the allegations as true, Plaintiff has failed to allege a breach of contract.

by this Court supports Plaintiff's argument, and the case authorities Plaintiff cites are inapposite.

Plaintiff relies upon this Court's decision in *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 618 S.E.2d 867 (2005), to support its contention that a genuine issue of material fact exists as to the actual reason for the revocation of IIHS from the Contract. *Johnson* arose from an action for wrongful termination of an employment contract. *Id.* at 367, 618 S.E.2d at 869. The contract provided that the employer could terminate the contract for cause and delineated the acts which would give rise to such a termination. *Id.* at 366-67, 618 S.E.2d at 869. The employee asserted that the employer provided a pretextual reason for his termination and that the actual reason did not fall within the contract's termination clause. *Id.* at 369-70, 618 S.E.2d at 870-71. This Court, affirming the trial court's denial of the employer's motion for summary judgment, held that the employee presented evidence sufficient to raise a genuine issue of material fact as to what the actual cause for termination was and "whether or not there was a breach." *Id.* at 369-70, 618 S.E.2d at 870-71.

Here, apart from the present case not being an employment dispute, the termination clause in the Contract is fundamentally different from the one at issue in *Johnson*. The Contract unambiguously states that Defendant may remove one or more services from the Contract for "no reason or *any* reason." (emphasis added).

Regardless of whether the provided reason for removal of IIHS was the actual reason, *any* stated reason is permissible, as a matter of law, under the Contract.

Plaintiff asks this Court to expand a public policy exception which permits at-will employees to assert breach of contract claims against employers following termination for a reason that is either in violation of the law or against public policy. The exception has not previously been applied by our appellate courts to the termination of a contract between two commercial entities, and we are unpersuaded that it should be applied here.

In *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818 (1985), the plaintiff, an at-will employee, claimed that her employer discharged her "in retaliation for her refusal to withhold testimony or testify untruthfully in a lawsuit against some of the defendants[.]" *Id.* at 335, 328 S.E.2d at 822. This Court held that the claim was not subject to dismissal because the defendant had "no right to terminate [the plaintiff's employment] for the unlawful purpose alleged in the complaint, and that [the] plaintiff's claim for breach of contract with resulting damages [had] been sufficiently alleged . . . ." *Id.* at 344-45, 328 S.E.2d at 828.

Plaintiff cites numerous other cases applying the exception in *Sides* to employment disputes. However, Plaintiff has failed to provide, nor have we found, any decision applying this public policy exception to breach of contract claims

between commercial entities. We decline to extend this doctrine and reject Plaintiff's argument.

2. Unfair and Deceptive Trade Practices

"In order to establish a claim for unfair and deceptive acts or practices, a plaintiff must allege sufficient facts tending to show: '(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.' " *S.N.R. Management Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 607, 659 S.E.2d 442, 448 (2008) (quoting *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001)). Our Court has held that a party's exercising of its right to terminate, *Tar Heel Industries, Inc. v. E.I. duPont de Nemours & Co., Inc.*, 91 N.C. App. 51, 57, 370 S.E.2d 449,452 (1988), or modify, *Gaynoe v. First Union Corp.*, 153 N.C. App. 750, 755, 571 S.E.2d 24, 27 (2002), a contract is insufficient to support a claim for unfair and deceptive trade practices. Because, as discussed above, Plaintiff's unfair and deceptive trade practices claim is based on Defendant's removal of IIHS from the Contract, and such conduct was within Defendant's rights under the Contact, we hold that Plaintiff's argument is without merit.

Conclusion

For the foregoing reasons, we affirm the trial court's dismissal of Plaintiff's breach of contract and unfair and deceptive trade practices claims.

AFFIRMED.

Judges BRYANT and DAVIS concur.

Report per Rule 30(e).